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Supreme Court, U.S.
FILED
AUG 19 1992
OFFICE OF THE CLERK

No. 92-121

IN THE

Supreme Court of the United States

October Term, 1992

PAUL L. HOFTYZER and ETHEL FAIRCLOTH,
Co-Administrators of the Estate of
Devin L. Faircloth, Deceased,

Petitioners,

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 19, 1992

28 pp

QUESTIONS PRESENTED

1. When, prior to the inception of a group insurance contract, a putative insured of the contract makes material misrepresentations on his application for insurance, does ERISA deprive a state court of jurisdiction to declare that the putative insured's fraud renders his coverage void *ab initio*?

2. Are a state statute and state decisional law which invalidate an insurance contract procured by the fraud of the putative insured "law(s) . . . which regulate insurance", and therefore "saved" pursuant to 29 U.S.C. § 1144(b)(2)(A)?

LIST OF PARENT COMPANIES AND NON WHOLLY-OWNED SUBSIDIARIES

Amoda Sdn. Bhd. (Kuala Lumpur)

Industrial Trust Company (Canada)

Prudential of America Life Insurance Company (Canada)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

The respondent, the Prudential Insurance Company of America, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Virginia Supreme Court's denial of discretionary appeal, and the opinion of the Circuit Court of Alexandria, Virginia, in this case. Those decisions are reproduced in the Appendix to the Petition.

On October 9, 1991, the Circuit Court for the City of Alexandria, Virginia (trial court) entered a decree of rescission in favor of plaintiff-respondent Prudential In-

surance Company of America (Prudential).[1] The Decree held that the putative insurance coverage at issue for defendant-petitioner, Devin L. Faircloth (Faircloth), was void *ab initio*, because of material misrepresentations Faircloth had made on his application for insurance. The trial court also denied Faircloth's Cross-Bill seeking insurance benefits. Faircloth did not assign error in the Virginia Supreme Court to the denial of the Cross-Bill, nor does he assign error on that point in his Petition to this Court.

Faircloth does not contend in this Court, nor did he contend in his Petition for Appeal to the Virginia Supreme Court, that the decree of rescission was erroneous under Virginia law. Rather, Faircloth contends that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, deprived the trial court of jurisdiction to decide Prudential's Bill of Complaint, which asserted that Faircloth's material misrepresentations on his insurance application rendered the purported ensuing insurance coverage void *ab initio*.

Faircloth's attempt to use ERISA as a shield to protect his misrepresentations should be rejected. Faircloth's contention that Prudential's action is preempted is predicated on the erroneous assumption that Faircloth became Prudential's insured and, hence, the beneficiary of an employee benefit plan. However, as the trial court held, Faircloth's putative coverage was void *ab initio*. Thus, because Faircloth never became a participant in, nor beneficiary of, the employee benefit plan for which Prudential provided insurance, indeed, because Fair-

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[1] A copy of the trial court's Judgment Decree is reproduced in the appendix to this brief at pp. 1-3.

cloth and Prudential never had any legal relationship whatsoever, Faircloth is not entitled to invoke ERISA preemption.

Congress never intended ERISA to preempt an action for rescission such as that brought by Prudential. Therefore, state law continues to govern the enforcement of truthfulness in the insurance application process. Congress clearly did not intend to allow individuals to fraudulently acquire the putative status of an insured and then erect ERISA as a barrier to a remedy for the fraud.

Congress' intent is plainly evident in ERISA's "savings clause." Under the terms of the "savings clause", state law is "saved" from preemption by ERISA if it "regulates insurance." Because both Virginia Code § 38.2-309 and Virginia decisional law governing misrepresentations on insurance applications "regulate insurance," such laws are saved from preemption, even if they might otherwise be construed as "relating to" an employee benefit plan.

This Court, as did the courts below, should reject Faircloth's transparent bootstrap attempt to use a federal statute to legitimize his fraudulent conduct. Logic, the language of ERISA, and sound public policy compel the conclusion that the trial court had jurisdiction to declare Faircloth's coverage void *ab initio*. Faircloth's Petition for Writ of Certiorari should be denied.

A. Statement Of Fact

Because Faircloth has assigned error to the trial court's ruling on his "motion to dismiss," and because Prudential prevailed at a trial on the merits, the facts on appeal are to be viewed in a light most favorable to Prudential. In the fall of 1986, Faircloth learned that he

had tested positive for HIV.[2] Recognizing the health threat posed to his sexual partners by his HIV positive status, Faircloth began practicing "safe sex"[3] immediately upon learning that he was HIV positive.

Between the time he was diagnosed as being HIV positive in the fall of 1986, and the end of 1987, Faircloth was treated regularly for his HIV status by his physician. Between October 30, 1986, and December 29, 1987, Faircloth visited his physician eight times. By January of 1988, Faircloth's physician was telling his patients with the HIV virus that they had a 60 percent chance of developing AIDS. Faircloth recognized AIDS to be a fatal disease.

In March of 1987, Faircloth began work at the Sheridan Group (Sheridan). Sheridan initially provided Faircloth with insurance issued by an insurer other than Prudential. In the Spring of 1988, Sheridan decided to change its insurance to Prudential. In connection with this change, and prior to inception of the Prudential contract with Sheridan, Faircloth submitted to Prudential an application for insurance (the application). At the time he submitted the application, Faircloth knew that AIDS was caused by HIV and knew that his HIV positive status could lead to AIDS. Faircloth also knew that at least 20 percent of persons who were HIV positive would develop AIDS-related symptoms. Yet, in spite of his knowledge, Faircloth answered "No" to the following question:

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[2] HIV (human immunodeficiency virus) is synonymous with HTLV-III (human T-cell lymphotropic virus). The virus is also referred to as the AIDS virus.

[3] The use of a latex condom during sexual intercourse is thought to limit the chance of transmitting the HIV virus.

> Has any person to be covered: any deformity, or any indication of any physical or mental disorder or any disease . . .?

Further, although he had seen his physician eight times, Faircloth indicated that he had visited his physician only once. Faircloth looked over the application and signed it.

On June 14, 1988, two months after Faircloth submitted the application containing the above-described misrepresentations, Sheridan's group policy with Prudential came into existence. Based on Faircloth's misrepresentations, he was listed as a covered individual on the certificate of insurance issued to Sheridan.

In the Spring of 1990, Prudential learned that Faircloth had misrepresented his health and his treatment by his physician on the application. Because of these misrepresentations, Prudential initiated a contest of Faircloth's coverage. Prudential timely brought suit in the trial court, seeking a judicial declaration that no valid insurance coverage had ever existed for Faircloth. Faircloth filed a Cross-Bill seeking benefits pursuant to ERISA.

Prior to trial, Faircloth moved to dismiss Prudential's Bill of Complaint on the ground that the state court lacked subject-matter jurisdiction. The trial court heard evidence and argument on Faircloth's motion and presided over a trial on the merits. The trial court denied Faircloth's motion. The court ruled in favor of Prudential on the merits stating that:

> Defendant was tested and found to be HIV positive in October, 1986. His application was filed with Prudential in April of 1988 and the evidence reveals that he was further tested in September and December of 1987; that he saw his physician on eight separate occasions between October, 1986 and the date of the appli-

> cation; that Faircloth knew or had been advised as to the then state of the knowledge of the effects of being HIV positive; and that on his application he advised that he had seen his doctor only one time 'for preventive medicine physical, 4/87, Dr. Warren Chamberline' (sic).
>
> Thus, the statements on Faircloth's application are untrue and are clearly material to the risk assumed by Prudential. § 38.2-309.

Faircloth did not assign error in the Virginia Supreme Court, and has not assigned error in this Court, to the trial court's ruling on the merits. Hence, Faircloth does not contend that under Virginia law he was never an insured of Prudential. Faircloth also assigns no error, in the Virginia Supreme Court or in this Court, to the trial court's denial of his Cross-Bill. Faircloth's failure to assign error to the denial of his Cross-Bill is fatal to his Petition for Writ of Certiorari, for the reasons explained below.

II. REASONS FOR DENYING THE WRIT

A. Faircloth's Failure To Assign Error To The Trial Court's Denial Of His Cross-Bill Renders The Questions Presented In His Petition Moot.

By failing to preserve his objection to the trial court's ruling on his Cross-Bill, Faircloth rendered his Petition for Appeal in the Virginia Supreme Court moot. Likewise his Petition for Writ of Certiorari is moot.

In response to Prudential's Bill of Complaint seeking rescission, Faircloth filed an Answer and Cross-Bill. Petition, Appendix B, pp. 4a-11a. The Cross-Bill asserted violations of ERISA and requested, *inter alia*, that:

> A. This Court decree and reinstate retroactively [Faircloth's] contractual rights to benefits under the employee welfare benefit plan and order specific performance of the contract; . . .
>
> C. This Court orders Counter-Defendant Prudential to pay all medical claims covered by the contract of insurance and submitted by Counter-Plaintiff. . .

Petition, Appendix B, p. 10a. In the Judgment Decree entered by the trial court, the court specifically ruled that:

> 3. Prudential's Bill of Complaint is granted; and
>
> 4. Faircloth's Cross-Bill of Complaint is denied.

See Judgment Decree, attached at appendix pp. 1-3.

Faircloth specifically objected to the denial of his Cross-Bill of Complaint when he endorsed the Judgment Decree. *Id.* at p. 3. However, in his Petition for Appeal to the Virginia Supreme Court, Faircloth identified only two assignments of error: (i) the trial court's ruling on Prudential's Bill of Complaint; and (ii) the trial court's denial of a motion *in limine* to preclude the introduction of Faircloth's application.[4] Faircloth did not assign error to the denial of his Cross-Bill.

The Rules of the Virginia Supreme Court are clear:

> The petition for appeal shall contain assignments of error . . . Only errors assigned in the petition for appeal will be noticed by this Court.

Va. Supreme Ct. Rule 5:17(c). By failing to assign error to the trial court's denial of his Cross-Bill, Faircloth

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[4] The page of Faircloth's Petition for Appeal which contains his assignments of error to the Virginia Supreme Court is reproduced in the appendix to this brief at p. 4.

necessarily rendered his Petition for Appeal moot. Even if the Virginia Supreme Court had reversed the trial court's granting of Prudential's Bill of Complaint, the denial of Faircloth's Cross-Bill would have remained intact. Hence, the denial of Faircloth's Cross-Bill, which became final when no error was assigned on appeal, precludes any recovery of benefits by Faircloth from Prudential. Thus, the Virginia Supreme Court properly rejected his Petition; this Court should do likewise.

Given this procedural status, were this Court to grant a writ of certiorari and ultimately reverse the trial court's decision on the preemption of Prudential's rescission action, there would be no effect on the ultimate outcome in the trial court. The trial court's denial of Faircloth's Cross-Bill, which stands unchallenged, would prevent any recovery by Faircloth. Thus, in essence, Faircloth's Petition seeks an advisory opinion from this Court.

B. The Decisions Below Are Not In Conflict With Any Decision of A Federal Court of Appeals.

In his Petition, Faircloth suggests that a conflict exists between the circuits on the issue of preemption by ERISA of claims for misrepresentation or fraudulent inducement. Petition, p. 15. However, the cases Faircloth cites to support this alleged conflict are factually dissimilar to this case.

The initial question presented here is whether an insurer's action for rescission, based on state statutory and decisional law recognizing that an insurance contract procured by material false answers on an application is void *ab initio*, is preempted. That question has never

been presented to, nor decided by, a federal circuit court of appeals. Indeed, a close analysis of the cases Faircloth cites in support of the asserted conflict on this question illustrates why an award of certiorari is not warranted.

The cases cited[5] are factually distinguishable from the facts of this case in several aspects. Indeed, this case presents a unique factual setting when compared to the cited cases. The cited cases involved claims made by participants; this case was initiated by the insurer. The cited cases seek recovery of benefits; this case is an action for rescission.

Moreover, the second question presented, whether Virginia law prohibiting material misrepresentations on insurance applications is saved by ERISA, likewise has never been addressed by a circuit court of appeals. Faircloth does not direct this Court to any decision interpreting the Virginia law at issue, or one even remotely similar. Hence no conflict can reasonably be claimed to exist as to the second question presented. In the absence of conflict on either question presented, Prudential submits that this Court's review of this case is not warranted.

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[5] *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989); *Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989); *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir.), *cert. denied*, 110 S.Ct. 1924 (1990); *Reilly v. Blue Cross Blue Shield*, 846 F.2d 416 (7th Cir.), *cert. denied* 488 U.S. 856 (1988); *Philips v. Amoco Oil*, 799 F.2d 1464 (11th Cir.), *cert. denied*, 481 U.S. 1016 (1987); *Kuntz v. Reese*, 760 F.2d 926 (9th Cir.), *vac'd on other grounds*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985).

C. ERISA Does Not Preempt Virginia Law Governing Misrepresentations On Insurance Applications.

In Virginia, no valid contract of insurance comes into existence when an applicant for insurance materially misrepresents the risk to be assumed by the insurer. *See, e.g. Mutual of Omaha Ins. Co. v. Dingus*, 219 Va. 706, 250 S.E.2d 352 (1979); *Hawkeye-Sec. Ins. Co. v. Government Employees Insurance Co.*, 207 Va. 944, 154 S.E.2d 173 (1967).[6] *Accord*, Va. Code §§ 38.2-309. The federal courts have recognized this principle of Virginia law. *See, In re Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192, 1242 (E.D. Va. 1988), *aff'd in part and rev'd in part, Foremost Guaranty Corp. v. Meritor Sav. Bank*, 910 F.2d 118 (4th Cir. 1990). In cases where the *Hawkeye* rule applies, the putative insurance coverage is void *ab initio*. *Hawkeye*, 207 Va. at 948, 154 S.E.2d at 176. Therefore, when an applicant for insurance materially misrepresents the risks to be assumed by his insurer, his purported insurance coverage never comes into existence.

1. ERISA Does Not Preempt Virginia's Laws Of Misrepresentation On Insurance Applications, Because An Employee's Membership In An Employee Benefit Plan Is A Predicate To ERISA Regulation.

In 1974, Congress enacted ERISA, 29 U.S.C. § 1001 *et seq*. ERISA created a detailed and complex system of regulating employee benefit plans. As part of the regulatory scheme, ERISA contains a broad supersedure provision, expressly preempting a wide area of state law. The supersedure provision provides:

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[6] For the sake of brevity, this rule of law will be referred to hereafter as "the *Hawkeye* rule."

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this Title and not exempt under Section 1003(b) of this title.

29 U.S.C. § 1144(a). "State laws" include "all laws, decisions, rules, regulations, or other state action having the effect of law." 29 U.S.C. § 1144(c)(i).

In attempting to clarify the meaning of the language of the supersedure provision, this Court has stated:

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.

Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). However, *Shaw* noted that although:

> Congress used the words 'relate to' . . . in their broad sense, . . . some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.

Shaw, 463 U.S. at 98–100, n.21. Hence, though ERISA preemption may be broad, it is not limitless.

The *Hawkeye* rule and Virginia Code § 38.2-309 are not preempted by ERISA, because they have no connection with or reference to an employee benefit plan. By definition, they regulate conduct which occurs prior to the time the ERISA relationship is formed. *Cf.*, *Shaw*, 463 U.S. at 96. In the instant case, Faircloth never became a plan beneficiary. Indeed the misrepresentations on which rescission is based occurred before the

plan under which Faircloth claims to be insured came into existence. Faircloth's misrepresentations rendered his putative coverage void *ab initio*. As such, he cannot, as a stranger to the Sheridan employee benefit plan, invoke the terms of the federal statute regulating that plan.

Research has disclosed no case addressing, and thus no conflict on, the initial question presented here: whether an insurer's state law action for rescission based on a putative insured's pre-plan fraud is preempted by ERISA. Indeed, Faircloth has cited no case holding that an insurer's action for rescission based on the misrepresentations of a putative insured is preempted by ERISA.

Leaving the effects of misrepresentations on a putative insured's application to be determined by state law is consistent with the scope of ERISA's regulatory scheme. ERISA does not mandate the substance of employee benefit plans or even that such plans be offered to employees at all. Rather, ERISA was enacted to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . ." 29 U.S.C. § 1001(b). There is nothing in the statute indicating Congress' intent to supplant state law governing fraud by a putative insured.

Faircloth has offered a lengthy list of cases in support of the proposition that actions for breach of contract and related torts are preempted by ERISA. Petition, pp. 15–16. Faircloth misapprehends the nature of Prudential's claim. Prudential has not sued to enforce the plan, but to have Faircloth's putative participation in the plan declared void. Faircloth fundamentally misconstrues an action for rescission *ab initio*. Whereas a breach of contract action necessarily affirms the existence of a contract, a rescission action seeks judicial acknowledgment that no contract ever was formed. Hence, Pruden-

tial's rescission action arises not out of a contract, but out of Virginia Code § 38.2-309 and the *Hawkeye* rule. The purpose is not to affirm a contract, but to prove that one never existed. The cases cited by *Faircloth* are, therefore, inapposite.

Faircloth also relies on *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). Such reliance is not well-placed, because *Pilot Life* did not address the preemption of claims analogous to Prudential's. *Pilot Life* considered Dedeaux's claim as one for the improper processing of a claim for benefits:

> [W]e conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-related plan is not saved by § 514(b)(2)(A), and therefore is pre-empted by § 514(a).

Pilot Life, 481 U.S. at 57. Thus, *Pilot Life* is not authority supporting the argument that actions for rescission based on an insurance applicant's misrepresentations are preempted by ERISA.

Faircloth grossly misrepresented his health and his medical treatment history on the application. Therefore, no valid insurance coverage existed for him. The putative relationship between Faircloth and Prudential was a nullity; Faircloth never became a member of the Sheridan plan. Inasmuch as ERISA's preemption clause reaches only laws that relate to employee benefit plans, and given that Faircloth was not a member of such a plan, ERISA does not impact on the jurisdiction of a Virginia court to declare Faircloth's fraudulently induced insurance coverage to be void *ab initio*.

2. Virginia's Laws Prohibiting Misrepresentations On Insurance Applications Are Saved From Preemption By ERISA's Savings Clause, Because Such Laws "Regulate Insurance".

Even if a state law relates to an employee benefit plan, it is "saved" from ERISA preemption if it "regulates insurance." *See* 29 U.S.C. § 1144(b)(2)(A). ERISA defines the term "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). Hence, ERISA's "savings clause" applies to state decisional law as well as state statutory law. *See Pilot Life*, 481 U.S. at 48, n.1.

In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court established two tests to determine whether a particular state law "regulates insurance". The first of these is the "common sense" test. *See Metropolitan Life*, 471 U.S. at 740. Under this type of analysis, the *Hawkeye* rule and Va. Code § 38.2-309 clearly "regulate insurance." Because both the *Hawkeye* rule and Code § 38.2-309 regulate and pertain specifically to insurance applications, common sense analysis leads to the conclusion that they "regulate insurance."

The second approach adopted in *Metropolitan Life* requires courts to look to cases interpreting the scope of the McCarran-Ferguson Act's reference to the "business of insurance" for guidance about whether a particular state law "regulates insurance." *See Metropolitan Life*, 471 U.S. at 742. The McCarran-Ferguson Act case cited by *Metropolitan Life* is *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). *Union Labor Life* established a three-part test for determining whether a prac-

tice falls within the McCarran-Ferguson Act's reference to the "business of insurance." The test has the following elements:

> *First*, whether the practice has the effect of transferring or spreading a policy holder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Union Labor Life, 458 U.S. at 129. Under the *Union Labor Life* test, the *Hawkeye* rule and Va. Code § 38.2-309 regulate insurance and are accordingly saved from preemption by the savings clause.

Rescinding insurance which is induced by an applicant's material misrepresentations transfers and spreads the risk of the insurers' policyholders. The Virginia rule allows insurers to accept only the risks that they intelligently and carefully consider prior to undertaking them. By rescinding contracts that are induced by material misrepresentations, an insurer can prevent the transfer of risk from a deceptive applicant to honest policyholders.

The enforcement of honesty in the application process is an integral part of the policy relationship between the insurer and the insured. If the insurer is unable to control the risks it assumes, it cannot conduct its risk-spreading function intelligently and efficiently. At the very least, an insurer must be fully informed so that it can evaluate risks. If risk is deceptively misrepresented, the insurer's calculations are distorted. Hence, it is integral to the insurer-insured relationship that the applicant for insurance be required to convey truthful information regarding the risks that he is asking the insurer to assume.

The third prong of the *Union Labor Life* test is also satisfied by the *Hawkeye* rule and Va. Code § 38.2-309. The *Hawkeye* rule and Va. Code § 38.2-309 allow for the rescission of insurance contracts when risk is materially misrepresented by the party seeking to shift the risk. Hence, both the *Hawkeye* rule and Va. Code § 38.2-309 pertain specifically and peculiarly to the insurance industry. Therefore, both the *Hawkeye* rule and Va. Code § 38.2-309 are indeed "limited to entities within the insurance industry." Thus, because the Virginia laws in question satisfy all three elements of the *Union Labor Life* test, Prudential's cause of action is not preempted.

Aside from *Union Labor Life*, the other leading case on the construction of the term "business of insurance" is *S.E.C. v. National Sec., Inc.*, 393 U.S. 453 (1969). *National Securities* held that laws aimed at regulating the relationship between an insurance company and a policyholder are laws regulating the "business of insurance." *National Securities*, 393 U.S. at 460. The *Hawkeye* rule and Va. Code § 38.2-309 certainly regulate the "business of insurance" under the *National Securities* test, because they specifically address and regulate the truthfulness of communications from insured to insurer. Such communications are clearly part of the relationship between insurer and insured. Accordingly, the Virginia rule "regulates insurance" and is saved from preemption by the ERISA savings clause.

Having met all three tests for determining whether or not they "regulate insurance," the *Hawkeye* rule and Va. Code § 38.2-309 are saved from preemption by the ERISA savings clause. Therefore, even if such laws relate to an employee benefit plan, they are nonetheless valid and controlling in this case, because Congress has expressly provided that such law not be preempted.

Accordingly, the trial court had subject-matter jurisdiction over Prudential's claim.

III. CONCLUSION

For the foregoing reasons, Faircloth's Petition for Writ of Certiorari should be denied.

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INSURANCE COMPANY
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CERTIFICATE OF SERVICE

I certify that I have caused to be mailed first class, postage prepaid, three true and correct copies of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** to Patricia A. Smith, Esquire, Sanders, O'Donnell & Smith, 515 King Street, Suite 400, Alexandria, Virginia 22314, this 19th day of August, 1992.

Lewis T. Booker

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,	)	
Plaintiff,	)	
v.	)	**IN CHANCERY**
	)	**NO. CH900414**
DEVIN L. FAIRCLOTH,	)	
Defendant.	)	

JUDGMENT DECREE

On July 19, 1991, the parties, The Prudential Insurance Company of America (Prudential), plaintiff, and Devin L. Faircloth (Faircloth), defendant, each represented by counsel, appeared for trial on Prudential's Bill of Complaint and Faircloth's Cross-Bill of Complaint.

The parties argued Faircloth's Motion to Dismiss and Motion In Limine; the Court took each under advisement.

Prudential presented its evidence in support of its Bill of Complaint. At the close of Prudential's evidence, Faircloth moved to strike Prudential's evidence. Said motion was denied.

Faircloth presented evidence in opposition to the Bill of Complaint and in support of the Cross-Bill. At the close of Faircloth's evidence, Prudential moved to strike Faircloth's evidence and for a summary judgment in its favor. Said motion was denied. The Court then took the matter under advisement. The parties filed post-trial memoranda.

On the basis of the evidence presented, the memoranda presented and the argument of counsel, and for the reasons set forth in this Court's September 4, 1991, letter

opinion, which is incorporated into this Decree by reference, it is hereby **ORDERED** that:

1. Faircloth's Motion to Dismiss is denied;

2. Faircloth's Motion In Limine is denied;

3. Prudential's Bill of Complaint is granted; and

4. Faircloth's Cross-Bill of Complaint is denied.

ACCORDINGLY, the insurance contract between Prudential and Faircloth is found to have been void *ab initio* and the same is rescinded. Prudential shall recover its costs in this action from Faircloth.

The Clerk is directed to send certified copies of this Judgment Decree to counsel of record.

The Honorable Alfred D. Swersky, Judge
Circuit Court for the City of Alexandria

DATE: 10/9/91

A COPY TESTE:
Edward Semonian, Clerk

By _____ Deputy Clerk

SEEN:

Lonnie D. Nunley, III
Brian V. Otero
HUNTON & WILLIAMS
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200
Counsel for The Prudential Insurance Company of America

SEEN AND OBJECTED TO AS REGARDS DENIAL OF THE MOTION TO DISMISS, DENIAL OF THE MOTION IN LIMINE, AND DENIAL OF FAIRCLOTH'S CROSS-BILL OF COMPLAINT:

Dale Edwin Sanders
Patricia A. Smith
SANDERS, O'DONNELL & SMITH
515 King Street, Suite 400
Alexandria, Virginia 22314
Counsel for Devin L. Faircloth

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No._____

DEVIN L. FAIRCLOTH

Petitioner,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

Appellee.

PETITION FOR APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA

Your Petitioner, DEVIN L. FAIRCLOTH, represents that he is aggrieved by the Final Order entered on the 9th day of October, 1991, in the Circuit Court of the City of Alexandria, Virginia, in Chancery No. CH90-0414, and petitions for the award of an appeal therefrom.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO HEAR PRUDENTIAL'S BILL OF COMPLAINT AND ERRED AS A MATTER OF LAW IN FAILING TO DISMISS PRUDENTIAL'S BILL OF COMPLAINT.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING FAIRCLOTH'S MOTION IN LIMINE TO PRECLUDE EVIDENCE RELATING TO FAIRCLOTH'S APPLICATION FOR INSURANCE UNDER HIS GROUP PLAN.